Case No: 2500769/18

EMPLOYMENT TRIBUNALS

Claimant: Mr N Latif

Respondent: David Lloyd Leisure Ltd

Heard at: North Shields **On: 22,23 & 24 October 2018**

Before: (1) Employment Judge A.M.S. Green
(2) Mr S Wykes
(3) Mr S Carter

Representation

Claimant: In person (assisted by his father, Mr M Latif)
Respondent: Mr J Anderson – Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the claimant's claims for automatic unfair dismissal and detriment for making a protected disclosure are dismissed.

REASONS

Introduction

1. The respondent operates health and sports clubs throughout the United Kingdom. The claimant was employed by the respondent as a sales consultant at their Newcastle Club premises. His employment started on 29 March 2017 when he was initially retained as a receptionist. He subsequently became a sales consultant until he was dismissed with immediate effect on 16 December 2017. The respondent believed that he was guilty of gross misconduct. This followed from an internal audit carried out by Jamie Williams which identified the claimant's and other employees' failure to follow the respondent's account opening procedures when taking on new customers at the club [104-107]. In particular, he failed to provide proof of age for new customers enrolling as 18-22-year-old members and he failed to collect a joining fee from a new member. At his disciplinary

hearing on 13 December 2017, chaired by Mr George Rounthwaite, the claimant accepted responsibility for his omissions. He was summarily dismissed by a letter dated 15 December 2017. He unsuccessfully appealed the decision to Ms Michelle Chambers-Cran. His appeal hearing was held on 10 January 2018 and he was notified of the outcome in a letter dated 19 January 2018. Having gone through ACAS Early Conciliation, the claimant presented his claims to the Tribunal on 11 April 2011. His claims were presented in time.

The claims

Automatic unfair dismissal for making a protected disclosure

2. Under Employment Rights Act 1996, section 108 ("ERA"), the claimant did not have the right to claim ordinary unfair dismissal as he had less than two years' service ending with the effective date of termination of his employment. His claim for unfair dismissal was advanced under ERA section 103A.

3. The claimant believes that he was unfairly dismissed because he made a protected disclosure. He maintains that his dismissal had nothing to do with misconduct. In summary he claimed the following:

    a. After he started working in the sales office, he realised there were several health and safety risks to the staff in that office. It was an internal office within the building without natural light. The issues that he identified included unsuitable or broken chairs, computer screens which were not adjustable which meant that staff had to lean over their desks to view a screen at chest height when they should have been at eye level. The working conditions were cramped, and he had to share his desk with another colleague. There were missing mouse mats and gel pads. The air quality in the sales office was poor because the ventilation ducts were connected to the adjacent kitchen. Noxious smells would percolate into the office. The office was also hot.

    b. The claimant frequently raised his health and safety concerns with his direct line manager, Nikki Shaftoe, during regular one-to-one meetings.

    c. Because of his concerns about his working environment, the claimant requested a Display Screen Assessment ("DSE") in mid-September 2017. This was completed by Kris Thompson, the respondent's Operations Support Manager. Mr Thompson also identified several electrical plugs that had not been PAT tested which was contrary to internal policy and which, he believed, would invalidate the respondent's insurance policy. The DSE confirmed several actions that he had identified. However, these remained outstanding and the claimant continued to raise his health and safety concerns. He approached the Operations Manager, Caterina Pipitone, and Kris Thompson about the outstanding matters.

    d. He believed that he had made qualifying disclosures in the public interest because of the health and safety risks to himself and his

colleagues. He reasonably believed that the information which he disclosed was substantially true. Caterina Pipitone was responsible for assessing and implementing remedies for any health and safety issues at the Newcastle Club. Nikki Shaftoe was sufficiently responsible because she was his first port of call within the management team given that he reported to her. His concerns were well known to other members of staff such as Aimee Coldwell and Samantha McOwan.

e. After making his disclosures verbally and having documented them within the DSE Assessment Log Sheet, he repeatedly told Nikki Shaftoe and Caterina Pipitone that the concerns and issues raised in the DSE assessment needed to be actioned and continued to pose a health hazard.

f. The claimant acknowledged that the respondent carried out the DSE assessment but did not take any action to close out fundamental aspects of the issues that were identified. This included providing lumbar support to chairs, replacing broken chairs, providing suitable monitors, improving the cramped working conditions and taking effective action to improve the air quality in the sales office.

g. On 16 November 2017 the respondent, acting through Jamie Williams, performed an unannounced internal audit to investigate new sales at the Newcastle Club. At that time, there were four employees comprising the sales staff. The claimant subsequently established that the audit covered 129 sales and highlighted that:

    i. the setup fee had not been taken for six New Member Sales ("NMS") within the audit sample;

    ii. proof of age was not taken for a large proportion of NMS requiring this.

h. Notwithstanding the audit's findings that all staff had sales allegedly breaching the respondent's policy, the claimant was the only sales consultant subjected to formal disciplinary action.

i. The claimant attended a disciplinary hearing on 13 December which was chaired by George Rounthwaite. He was dismissed by letter dated 15 December 2017 [143]. His effective date of dismissal was 16 December 2017. He believed that the operative reason for his dismissal was that he was viewed as a troublemaker following the health and safety concerns that he had raised.

j. He appealed the decision. His appeal was heard by Michelle Chambers-Cran 10 January 2018. Ms Chambers-Cran upheld the original decision [182].

Detriment for making a protected disclosure

4. He also claimed that he suffered detriment short of dismissal. His detriment claims were:

a. He was not informed that he was the subject of investigation relating to the findings of the new member sales audit.

b. He was treated inconsistently and unfairly during the investigatory process and subsequent formal disciplinary process and sanction;

c. The respondent refused to provide the claimant with crucial and key information disclosure relating to the allegations against him.

d. The respondent removed his November 2017 commission when the audit identified only some of the claimant's October sales to be problematic.

e. There was criticism and complaints to other members of staff regarding the claimant by the respondent's management which made the claimant feel upset and helpless to implement positive change.

f. The respondent's senior management behaved coldly towards the claimant because he had made a protected disclosure.

The response

5. The respondent acknowledged that the claimant raised concerns about the office environment, but these did not amount to protected disclosures as defined by ERA, section 43A.

6. The claimant participated in the investigation concerning the issues surrounding his paperwork. He attended a meeting with John Jamieson, the Regional Sales Manager on 5 December 2017. Because of that meeting, Mr Jamieson recommended that the claimant should be subject to disciplinary proceedings.

7. The respondent did not dismiss the claimant or subject him to detriment for making his alleged protected disclosure. The decision to terminate his employment was entirely because of the claimant's conduct in that he failed to comply with the respondent's NMS Policy which gave rise to loss of trust and confidence in him. The specific reasons for his dismissal were given by the respondent in a letter dated 15 December 2017 [143]. These were as follows:

    a. Mis-selling of club memberships, specifically failure to charge joining fees resulting in a loss to the business of £130 and a potential financial gain in commission.

    b. Failure to gain proof of age for 18-22 memberships, resulting in a potential gain in commission.

8. Mr Williams, Mr Jamieson and Mr Rounthwaite were unaware of the claimant raising any issues concerning health and safety. Ms Chambers-Cran was aware of his DSE assessment but concluded that the reason for his dismissal was because he failed to follow the respondent's sales policy.

9. The claimant was not the only employee to be dismissed because of the issues identified in the audit report. The club administrator, Michelle Pearson, was also dismissed because of her actions and omissions relating to the NMS policy. These were also identified in the audit.

10. The respondent denies that the claimant suffered detriment because of his alleged protected disclosures. Regarding his November 2017 commission, it was contended that this was noncontractual and merely discretionary. The Sales Commission Scheme provided that because the claimant was under investigation for alleged breaches of the respondent's sales policy he was not entitled to payment of a commission.

The issues

11. At a private preliminary hearing on 19 June 2018, Employment Judge Garnon identified the issues for the Tribunal to determine. These were as follows:

    a. Did the claimant communicate information under ERA section 43C concerning health and safety risks arising in the Sales Office at the respondent's Newcastle Club tending to show the health and safety of an individual was being, or was likely to be, endangered?

    b. Did the claimant have reasonable grounds for believing the health and safety of an individual was being, or was likely to be, endangered?

    c. Did the claimant reasonably believe the disclosure to be in the public interest?

    d. If the claimant made a protected disclosure, has he proved on a balance of probabilities, the making of it was the principal reason of the officer of the respondent who took the decision to dismiss him?

    e. Was the claimant subjected to detriment other than dismissal as pleaded in the claim form as now amended?

    f. If so, was the claimant subjected to detriment other than dismissal as pleaded, because he had made a protected disclosure?

    g. To what remedy is the claimant entitled to if he succeeds? Specifically:

        i. Was the disclosure made in good faith?

        ii. Should any reduction be made to reflect the claimant's contributory conduct and/or the likelihood he may or would have been dismissed in any event?

        iii. Has he taken reasonable steps to mitigate loss?

Documents and hearing

12. The parties prepared a joint hearing bundle which was indexed and paginated. We admitted additional documents into evidence at the hearing. The respondent went first. The following people adopted their witness statements and gave evidence:

    a. **Mark Sylvester** – the respondent's General Manager of its Newcastle Club.

    b. **John Jamieson** – the respondent's Regional Sales Manager for the North West of England. He conducted the investigation of the claimant and other employees at the Newcastle Club following the results of the internal audit.

    c. **George Rounthwaite** – the respondent's General Manager of its Harrogate club. Mr Rounthwaite was the dismissing officer. At that time, he managed the Respondent's Teesside Club.

    d. **Michelle Chambers-Cran** – the respondent's Regional Manager. She was the appeal officer. At the time of the claimant's appeal she was the General Manager of the respondent's Glasgow West End Club.

    e. **The Claimant**

    f. **Aimee Coldwell** – the respondent's former sales consultant and a colleague of the claimant during his employment at the Newcastle Club.

    g. **Mark Poolan** – the respondent's former Sports Manager and a former colleague of the claimant's at the Newcastle Club.

    Nikki Shaftoe was subject to a witness order and was called by the claimant. Ms Shaftoe is a Sales Manager with the respondent and was a former colleague of the claimant. She did not provide a witness statement and gave oral evidence in chief.

13. The claimant and Mr Anderson provided written submissions to the Tribunal and made oral submissions.

    Basis of our decision

14. For the sake of brevity, we do not propose to paraphrase the oral evidence, or the written submissions given that these are preserved on the file. We have carefully considered all the oral and documentary evidence together with our records of proceedings and the written and oral submissions. The fact that we do not refer to every document in the hearing bundle does not mean that we have not considered them.

    Burden and standard of proof

15. As the claimant does not have the requisite qualifying period of service for making a complaint of ordinary unfair dismissal, he must establish that the principal reason for his dismissal was the making of a protected disclosure. The only basis upon which his claim can succeed is if the claimant

demonstrates that. If it was, the dismissal is automatically unfair. He has to establish his claim on a balance of probabilities.

16. Regarding his detriment claim, the claimant must establish that he suffered detriment on the ground that he made a protected disclosure on a balance of probabilities. This involves an analysis of the mental processes (conscious or unconscious) of the respondent acting as it did. It is insufficient for the claimant to demonstrate that, "but for" the disclosure, the respondent's act or omission would not have taken place. There is no requirement for a comparator. If the claimant establishes that he has made a protected disclosure and that there has been detrimental treatment, the respondent then must establish the reason for the treatment (ERA section 48(2)). If the respondent does not prove an admissible reason for the treatment, the Tribunal is entitled (but not obliged) to infer that the detriment was on the ground that the claimant made a protected disclosure. The detriment must be more than just related to the disclosure. There must be a causative link between the protected disclosure and the reason for the treatment, in the sense of the disclosure being the "real" or "core" reason for the treatment.

Applicable law

17. Sections 43A to 43L and 103A ERA protect workers reporting malpractice by their employers or third parties against victimisation or dismissal.

18. The dismissal of an employee will be automatically unfair if the reason or the principal reason for their dismissal is that they have made a "protected disclosure". There is no financial cap on compensation in whistleblowing claims and no requirement for a minimum period of service.

19. For the claimant to succeed depends on him satisfying the following tests:

    a. Did he make a qualifying disclosure? There are several requirements for a qualifying disclosure (ERA section 43B):

        i. Did he disclose information? Merely gathering evidence or threatening to make a disclosure is not enough.

        ii. The information must relate to one of six types of "relevant' failure.

        iii. The claimant must have reasonable belief that the information tends to show one of the relevant failures.

        iv. The claimant must have a reasonable belief that the disclosure is made in the public interest.

        v. The disclosure must also qualify as a protected disclosure (ERA sections 43C-43 H). Broadly this means making the disclosure to the employer (internal disclosure) as the primary method of whistleblowing. The law also permits disclosure to third parties (external) disclosure under more limited circumstances.

b. For a qualifying disclosure to be protected the authorities show that its timing is crucial. There are various times when a disclosure is protected, including during employment with the respondent employer (as is the case here).

20. Disclosure is not defined in the legislation, but it is wide enough to include being made in writing or verbally. In one case, it was held that a video recording amounted to a disclosure. There must be disclosure of information. In **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38** the EAT held that to be protected a disclosure must involve information, and not simply voice concern or raise an allegation. It suggested that:

> *The ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the last two weeks. Yesterday, sharps were left lying around. Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation and not information.*

21. A qualifying disclosure is a disclosure of information which, in the reasonable belief of the worker making it, tends to show that one or more of the six specified types of malpractice has taken place, is taking place, or is likely to take place (ERA section 43B (1)). In this case, the claimant claims he had made a disclosure relating to danger to the health and safety of any individual (i.e. himself and his colleagues in the sales team). This type of malpractice is covered (ERA section 43B (1)(d)).

22. The claimant's disclosure will only qualify if he reasonably believed that it was in the public interest. We are reminded that in **Chesterton Global (t/a Chesterton) v Nurmohamed [2017] EWCA Civ 979**, the Court of Appeal gave the following guidance:

    a. The Tribunal must determine whether the worker subjectively believed at the time that the disclosure was in the public interest and, if so, whether the belief was objectively reasonable.

    b. There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the Tribunal should not substitute its own view.

    c. The reasons why the worker believes disclosure is in the public interest are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to the Tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

    d. Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief.." which is not the same as "motivated by the belief…"

e. There are no "absolute rules" about what it is reasonable to view as being in the public interest. Parliament had chosen not to define what "the public interest" means in the context of a qualifying disclosure, and it must therefore have intended employment tribunals to apply it "as a matter of educated impression".

23. The claimant does not have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation. He must subjectively believe that the relevant behaviour has occurred or is likely to occur and his belief is, in the Tribunal's view, objectively reasonable. It does not matter that his belief subsequently turned out to be wrong or that the facts that he alleged would not amount in law to the relevant failure.

24. In **Royal Mail Ltd v JHUTI [2017] EWCA Civ 1632** the Court of Appeal held that an employee was not automatically unfairly dismissed for making protected disclosures to her line manager because the person who took the decision to dismiss her was unaware of those disclosures. A decision by one person in ignorance of the true facts, which is manipulated by someone else who is responsible for the employee and does not know the true facts, cannot be attributed to their employer. The statutory right not to be unfairly dismissed depends on their being unfairness on the part of the employer; unfair or even unlawful conduct on the part of individual colleagues or managers is immaterial unless it can properly be attributed to the employer. An employer cannot be deemed to have knowledge of all facts known to its employees when deciding whether it was reasonable for it to dismiss; if a fair and thorough investigation has been carried out, it is only the facts known to the decision maker that are relevant in determining whether the dismissal was fair. However, the court commented that it might be appropriate in some cases to depart from that principle. This might arise in cases where facts are manipulated by someone with responsibility for the investigation, or where facts are manipulated by someone near the very top of the hierarchy.

25. The claimant has also made a detriment claim. He has the right not to be subjected to any detriment on the ground that he has made a protected disclosure (ERA section 47B (1)). ERA does not define detriment. Tribunals have looked to the meaning of detriment established by discrimination case law. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** it was held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An "unjustified sense of grievance" is not enough.

26. A person who subjects a whistleblower to a detriment must be personally motivated by the protected disclosure for the detriment claim to succeed. We are reminded that in **Malik v Cenkos Securities Plc UKEAT/0100/17** the EAT held that another person's knowledge and motivation cannot be imputed.

27. Turning to the subject matter of the claimant's disclosure, an employer must protect its workers from the health risks of working with display screen equipment (DSE), such as PCs, laptops, tablets and smartphones. The

Health and Safety (Display Screen Equipment) Regulations 1992 apply to workers who use DSE daily, for an hour or more at a time ("DSE Regulations"). The Health and Safety at Work Act 1974, section 2(1) provides it shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

Discussion and findings

Did the claimant communicate information under ERA section 43C concerning health and safety risks arising in the Sales Office at the respondent's Newcastle Club tending to show the health and safety of an individual was being, or was likely to be, endangered?

28. Having considered the evidence, we were satisfied that the claimant communicated information to the respondent about the following:

    a. Broken chairs.

    b. Non-adjustable computer screens.

    c. Poor air quality in the ventilation system into the sales office which he shared with his sales team colleagues. The principal concern was air was being conveyed from the kitchen causing unpleasant cooking smells in the office. The claimant suggested that the air should be purified.

    d. Excessive heat in the office. We heard that a fan had been provided from another office before the claimant raised his concerns. Clearly this must have been inadequate.

    e. Sharing desks in cramped spaces.

    f. Missing gel pads on mouse mats.

    g. Some electrical appliances did not have stickers to show that they had been PAT tested.

29. These disclosures all related to health and safety issues that impacted on the claimant and his colleagues in the sales office. The subject matter of the disclosures was wide ranging and included ergonomics at his and his colleagues' workstations, electrical safety, ambient temperature and air quality. He was conveying facts to the respondent and not simply making allegations or raising concerns. It is well known that problems with workstations, particularly monitor height can cause chronic muscular skeletal problems such as frozen shoulders or back pain. Poor air quality can cause respiratory problems. Appliances which have not been PAT tested may not be safe and can be lethal if they malfunction. These were not trivial facts that the claimant had brought to the respondent's attention.

30. The evidence suggests that the claimant was wholly or at least mainly motivated to disclose information showing the respondent's malpractice because he was worried about his own and his colleague's safety. We were also satisfied on the evidence that the claimant communicated this

information regularly to his line manager, Nikki Shaftoe. We noted in her evidence that she said that happened during one-to-one meetings that she had with the claimant. The claimant also raised his concerns in the DSE assessment that was completed by Kris Thompson. Indeed, there was no issue between the parties that a DSE assessment was completed. What was surprising was its fate. We heard that the claimant's DSE assessment no longer existed in hard copy or electronically. Mr Sylvester said that the hard copy DSE was kept with others in a file behind the reception desk at the Newcastle Club. He had removed it to scan into an email to Michelle Chambers-Cran as she was working on the claimant's appeal. He did not remember what he did with the hard copy after that. One thing was certain, it is no longer in the file. In her evidence Ms Chambers-Cran remembered receiving and reviewing the DSE assessment. However, she subsequently deleted it from her inbox. We understood that once an employee deleted an email from his/her inbox it was the respondent's GDPR policy to delete all emails from their servers after 30 days. This was what happened with the electronic version of the claimant's DSE assessment. We were surprised that Mr Sylvester did not return the claimant's DSE assessment to file for safekeeping. This was an important health and safety document which should have been preserved. Record keeping forms part of an employer's duty to risk assess hazards and to manage them[1].

31. We were, however, shown an example of another DSE assessment completed by Mr Thompson on behalf of Aimee Coldwell [201 A-C]. Ms Coldwell also worked in the sales team with the claimant. This helped us to understand what a DSE assessment covered. It is a standard document with 6 categories:

    a. Nature of job.

    b. User eye sight.

    c. Health aspects.

    d. Posture and furniture adjustability.

    e. Visual factors.

    f. Fatigue and stress factors.

32. Under each category there are several sub-questions (up to 20 in some cases) with tick boxes requiring a "yes" or a "no" answer. We also noted a pro forma action log relating to a DSE assessment [201 E]. However, we did not see any completed examples. There was also a pro forma user register [201 D] but there was no example of a completed register.

33. We have no doubt that the DSE documentation that we were shown was used by the respondent as part of its obligations under the DSE Regulations which form part of its general health and safety obligations towards its employees.

[1] This is a matter of judicial knowledge; Judge Green is a member of the Institution of Occupational Health and Safety and practised health and safety law as a solicitor.

34. The evidence clearly shows that the claimant disclosed information which conveyed the facts which we have identified above. He was not simply voicing a concern or raising an allegation (e.g. "the respondent breaches health and safety law".). He did much more than that by identifying facts that he believed broke health and safety law. He believed that the respondent was guilty of malpractice relating to the health and safety of himself and his colleagues in the sales team.

    Did the claimant have reasonable grounds for believing the health and safety of an individual was being, or was likely to be, endangered?

35. The claimant had reasonable grounds for believing the health and safety of an individual was being or was likely to be endangered because he had identified several problems that he and his colleagues had with their physical working environment such as broken chairs or excessive heat or noxious smells emanating from the ventilation system – those are facts. Clearly these were sufficiently serious for the respondent to act. The claimant's concerns and the specific failings he identified were acknowledged by Mr Thompson when he completed the claimant's DSE assessment. Mr Thompson was not the only person in the respondent's management hierarchy to know of these issues. In her evidence Ms Shaftoe admitted that the claimant had raised health and safety issues with her at the end of August or the beginning of September 2017 when he told her that he was uncomfortable in the office. In response, the respondent arranged for Ray, the handyman to make him a screen raiser. She accepted that the office had been hot and stuffy, and they had got a fan from another employee's office. They had also kept the door open. She accepted that the claimant had discussed his DSE assessment with her many times. She had contacted Mr Thompson to get the claimant a new chair. In other words, there were specific problems with items that the respondent sought to remedy. Whether these problems were trivial, as suggested by the respondent, is irrelevant for present purposes. In the scheme of things, unlike a gas leak, a broken chair may not be a death trap or a major hazard but it nonetheless can endanger a person's health or safety and it was reasonable for the claimant to believe that.

    Did the claimant reasonably believe the disclosure to be in the public interest?

36. We believe that the claimant reasonably believed that the disclosure was in the public interest. It was clear from his evidence that the claimant was concerned that the problems he identified put his and his colleagues' health and safety at risk. This motivated him to request the DSE assessment and to raise the matter repeatedly with Ms Shaftoe in one to one meetings. He was worried that these would have long term consequences and it was his duty to raise this with the respondent's management. For example, in his witness statement the claimant says that because the computer screens were not height adjustable, staff members had to lean over their desks to view a screen at chest height when they should have been at eye level [§8]. He believed that this put unnecessary strain on the neck and shoulder muscles which is a risk to health and safety. We believe that his disclosure was objectively reasonable and in the public interest. It is obviously in the public interest and a matter of health and safety law that an employer protects the health, safety and welfare of its employees. These are well

known duties set out in Health & Safety at Work Act 1974, section 2. Failure to do so results in accidents and, in some cases, fatalities rendering the employer strictly liable unless it can show that it took all reasonable steps to minimise the risk. Furthermore, the respondent was also under a duty to conduct a DSE assessment under the DSE Regulations. The public interest requires that employees must work in a safe environment. This is fundamentally important and is an implied term in every contract of employment.

If the claimant made a protected disclosure, has he proved on a balance of probabilities, the making of it was the principal reason of the officer of the respondent who took the decision to dismiss him?

37. We do not believe that the claimant has established his claim on a balance of probabilities. There are some key antecedent facts which provide important context for understanding our conclusion together with what happened during the disciplinary process. Things had not been going smoothly for the claimant prior to being investigated by Mr Jamieson. We heard evidence from Ms Shaftoe that the claimant had his probation extended before it was confirmed. Furthermore, she told us that a customer had complained to the respondent's chief executive about the claimant's behaviour on an unrelated matter. The claimant told us that he was planning to leave the respondent. When he was cross examined on remedy, he admitted that he was looking for alternative employment before the disciplinary process had even been initiated. He said that he was looking for another job before he was investigated by Mr Jamieson and that he wanted to leave the respondent as soon as possible. He told us that had he been offered another job, he would have given one month's notice as required by his contract [87].

38. "Occam's Razor" is the problem-solving principle that the simplest solution tends to be the correct one. When presented with competing hypotheses to solve a problem, one should select the solution with the fewest assumptions. In this case, the two competing hypotheses are:

    a. The claimant was a trouble maker because he made a protected disclosure. The disciplinary process was a pretext to get rid of him. It was tainted by Mr Jamieson and Mr Sylvester manipulating Mr Rounthwaite and Ms Chambers-Cran with information about the protected disclosure (i.e. "pouring pestilence into their ears"). There was no objective basis to justify dismissing the claimant. There was a management conspiracy to get rid of him. He suffered detriment because he made a protected disclosure.

    b. On being investigated there was a prima facie case for the claimant to answer; he had breached the respondent's NMS policy. The case against him was established. His misconduct justified his dismissal.

39. Applying this principle to the evidence in this case, if the respondent had wanted to dismiss the claimant because he was a trouble maker, it could simply have declined to confirm his probation rather than going through a contrived and convoluted disciplinary process to disguise the real reason for his dismissal. That did not happen; his probation was confirmed. The trigger for disciplinary action was the internal audit. We have not lost sight

of the fact that the claimant accepted that he had only raised whistleblowing after he had been told he had been dismissed. That is significant and Mr Anderson explored this with the claimant during cross examination. Why did he wait until the appeal stage to allege the link between his dismissal/detriment and the protected disclosure? The claimant said that he did not think that he was at risk of being dismissed when he was first notified of the disciplinary action against him. He went on to say that he was very surprised to be dismissed and he thought that there must have been some ulterior motive, and this had to be his protected disclosure. He believed that he was being dismissed because he was a trouble maker. With respect to the claimant, this is simply not credible. First, if he had concerns that there was a conspiracy within the respondent's organisation, he could and should have raised these at the point when he was summoned to his disciplinary hearing. He could have challenged the disciplinary process at that stage particularly as he knew from the content of the letter inviting him to the disciplinary hearing that dismissal was a possible outcome [129]. Furthermore, he had no reason to be surprised when he was dismissed because the letter specifically warned him that could be a possible outcome.

40. The evidence clearly points to the respondent dismissing the claimant because of breaches of its sales policy as set out in the dismissal letter. The claimant alleged that Mr Rounthwaite and Mr Jamieson knew about the disclosures and this contaminated their judgment. If he believed that Mr Jamieson and/or Mr Sylvester were influencing Mr Rounthwaite by "pouring pestilence into his ear" he could have raised a red flag about this as soon as he was investigated after the audit. Alternatively, he could have done this when he received the letter inviting him to the disciplinary hearing. The claimant is an articulate and educated man. According to his own evidence he has a law degree from the University of Manchester. Given his obvious abilities in preparing and presenting his claim to this Tribunal, he was more than capable of raising a formal grievance about being punished for blowing the whistle long before the appeal stage. It is reasonable to infer from his behaviour that timing of his allegation meant that it was an afterthought or mere speculation with no basis in fact.

41. We do not believe that Mr Rounthwaite was manipulated in any way by Mr Jamieson or Mr Sylvester. Mr Jamieson was clear in his evidence that he did not know about the claimant's disclosure and, therefore, could not have manipulated Mr Rounthwaite. Mr Rounthwaite said that he based his decision to dismiss on the internal audit and the results of Mr Jamieson's investigation. We accept that Mr Sylvester first saw the assessment after the disciplinary hearing when he sent it to Ms Chambers-Cran. Mr Sylvester could not have influenced Mr Rounthwaite's decision to dismiss.

42. When we looked at the evidence relating to the appeal, we were impressed by Ms Chambers-Cran. We thought she was a reliable witness. There is no doubt that Ms Chambers-Cran had reviewed the claimant's DSE assessment. The claimant had asked her to do so [145]. As already noted this was the first time that he had raised the issue of a purported link between his dismissal and the disclosure. In response to his request, Ms Chambers-Cran spoke to all parties concerned. She read the DSE assessment and concluded that it was not a serious breach of health and safety. Indeed it would be fair to say that she thought it was trivial. She

spoke to Mr Jamieson and to Mr Rounthwaite. Mr Rounthwaite confirmed to her that the claimant had not raised health and safety issues with him. She understood from Mr Rounthwaite that he was unaware of the claimant's health and safety issues and he did not know about the claimant's DSE assessment. In paragraph 37 of her witness statement, Ms Chambers-Cran considered the DSE assessment and even if it had been raised earlier she saw no reason why anyone would want to remove the claimant. She notes that the dismissing officer, Mr Rounthwaite was the general manager of another club. He had no reason to punish the claimant for raising health and safety concerns at the Newcastle Club. We agree with that assessment. It is also noteworthy that another employee, Michelle Pearson, was also dismissed by the respondent at the same time for breaching its sales policy. Her breaches had also been identified by the internal audit. We accept that the operative reason for dismissing the claimant was his misconduct. Ms Chambers-Cran behaved properly in responding to the claimant's request to review the DSE assessment and she was justified in reaching her decision to uphold the dismissal.

43. In his submissions, when dealing with detriment, the claimant describes the disciplinary process as being fast-track (i.e. cursory). He accused Mr Rounthwaite of not giving the claimant an opportunity to defend himself. The evidence does not support this. The claimant attended an investigatory meeting with Mr Jamieson. The respondent wrote a detailed letter to the claimant on 6 December 2017 setting out the allegations against him. He was notified that the disciplinary hearing would be on 13 December 2017. He was notified of his right to be accompanied. The claimant had ample time to prepare and he knew the charges against him. He appealed the decision. He participated fully in the entire process. Unlike Michelle Pearson, who was also dismissed and who had overall responsibility for sales, he was not given the full audit report details because he did not need to see them. Furthermore, the claimant accepted that he breached the respondent's sales policy. He admitted that he made errors. The trap that he has fallen into is to attack the reasonableness of the respondent's decision as the basis of the unfairness rather than to establish the causal link between the protected disclosure and the dismissal which he must do to establish his claim for automatic unfair dismissal. Reasonableness comes into play with ordinary unfair dismissal cases. This is not an ordinary unfair dismissal case.

44. The two stated reasons for dismissing the claimant ran through the whole disciplinary process. The claimant mis sold memberships to customers. He failed to produce proof of age for young adults in the 18-22 membership category. He did not take an entry fee for a new member. In so doing, he breached the respondent's sales policy, and this warranted disciplinary action.

45. Looking at this in the round, given the issue of the customer complaining to the chief executive, his extended probation and the claimant looking for another job it is fair to say that things had not been going well for him before he was even investigated let alone dismissed; he wanted to leave the company. He did not see or want a long-term future with the respondent. Alleging a link between the protected disclosure and his dismissal/detriment at such a late stage merely diverts attention away from the real reason for his dismissal: his conduct.

46. This will be a difficult decision for the claimant and we understand that it is important for him to clear his name and we feel that it is important to state that we do not believe that the evidence supported the respondent's conclusion that the claimant had been dishonest when he breached its NMS policy. It was clear to us that his fault was the consequence of administrative carelessness and a tendency to bypass the rules about following the correct procedure when enrolling new members and assigning them to the correct categories of membership and completing the necessary due diligence in establishing their age. He was not alone given Michelle Pearson was also dismissed. He admitted that he was too busy to follow the correct procedure. We formed the distinct impression that the claimant was not motivated by financial gain when he broke the rules. Indeed, the evidence showed that he had gained full commission before these problems occurred. He also sacrificed some of his own leads to help Aimee Coldwell hit her monthly target. That is altruism. It was not selfish behaviour and certainly not evidence of deception. Furthermore, his evidence was that he did not claim all his expenses to which he was entitled. This also points to a person who is not motivated by financial gain. The respondent did not challenge this. The respondent's finding of dishonesty and motivation for financial gain was not justified.

    If so, was the claimant subjected to detriment other than dismissal as pleaded, because he had made a protected disclosure?

    For the reasons given above, we do not believe that the claimant was subject to detriment. As per its policy, the respondent did not pay the November commission for the reasons it gave. In any event, the commission was discretionary and not contractual. The respondent followed a fair disciplinary procedure involving the claimant at each stage from the investigation through to the appeal.

    To what remedy is the claimant entitled to if he succeeds?

47. The claimant has not established his claims and is, therefore, not entitled to any remedy.

Employment Judge A.M.S. Green

Date 3 November 2018